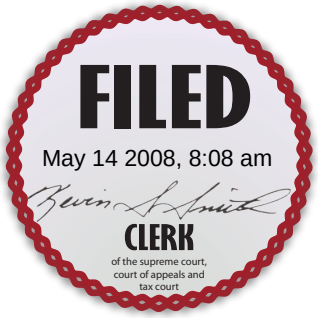

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IN THE
COURT OF APPEALS OF INDIANA

ROSENDO HERNANDEZ, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 12A02-0712-CR-1013
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CLINTON CIRCUIT COURT
The Honorable Randy Hainlen, Senior Judge
Cause No. 12C01-0609-FA-229

May 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Rosendo Hernandez, Jr. appeals his conviction for Dealing Cocaine, as a Class A felony.[1] We affirm.

Issues

Hernandez presents four issues on appeal, which we consolidate and restate as:

I. Whether the verdicts on the two charged counts of Dealing Cocaine were fatally inconsistent;

II. Whether certain compact disc recordings were properly authenticated; and

III. Whether the State established a proper chain of custody for the CD recordings and the cocaine.

Facts and Procedural History

After confessing to his involvement in a theft under investigation, Ryan Winchester agreed to assist the Frankfort Police Department in drug investigations through controlled buys. Detective Jason Albaugh, leading the particular controlled buy operation, was assisted by Detective William Hackerd and Winchester. On March 9 or March 10, 2006, Winchester called Hernandez to arrange a cocaine purchase. Winchester then called Detective Albaugh to inform him that he had arranged to purchase a quarter ounce of cocaine from Hernandez for two hundred and fifty dollars.

On March 10, 2006, Detectives Albaugh and Hackerd met Winchester at a parking garage in Frankfort to prepare for the controlled buy that was to occur at 1458 Krug Road in Frankfort. The detectives searched Winchester's person and car, and Winchester was provided with two hundred and fifty dollars in buy money. Winchester was also fitted with a

digital recording device, which he did not know how to operate. Detective Hackerd activated the device before the buy and deactivated it once the buy was concluded. At approximately 5:30 p.m., Winchester then drove his car out of the parking garage followed by the detectives, who maintained visual contact with Winchester's car.

In response to Winchester knocking on the door at the residential destination, Hernandez opened the door. They spoke briefly about the rims on Hernandez's car. Winchester then asked Hernandez to look at the CD player in his car. After Winchester was sitting in his car, Hernandez threw a quarter ounce of cocaine in Winchester's lap. Winchester paid the agreed amount and left shortly thereafter. During this time, the detectives observed the interaction from their car, parked some distance away from the residence. Detective Albaugh took a dozen or so surveillance photographs. The detectives were able to watch the movement of the two individuals, but their position was too distant to be able to identify the person with whom Winchester was talking.

Detectives Albaugh and Hackerd followed Winchester's car back to the parking garage, where Winchester provided them with two knotted plastic bags containing a white powder-like substance. Winchester and his vehicle were searched to ensure that he did not have any additional drugs or money on his person. After a short debriefing, Winchester left the garage.

To perform another controlled buy, Detectives Albaugh and Detective Jeffrey Ward met Winchester at Greenlawn Cemetery on the evening of March 17, 2006. Winchester had contacted Detective Albaugh earlier that evening, indicating that he would be able to

[1] Ind. Code § 35-48-4-1.

purchase an "eightball" of cocaine from Hernandez for one hundred and forty dollars. The Detectives searched Winchester and his car and then provided Winchester with a pocket tape recorder that Winchester knew how to operate. The Detectives then followed Winchester's car to 1458 Krug Road by tracking his taillights because it was dark. Hernandez allegedly met Winchester at the door. Hernandez gave Winchester the cocaine, and Winchester paid him one hundred and thirty dollars. After a short conversation, Winchester left and drove back to Greenlawn Cemetery to meet with the detectives. Because of the distance between their car and the home as well as the darkness of night, the detectives were unable to observe the exchange. On the drive back, Detective Albaugh called Winchester on his cell phone to caution him to turn off his headlights because they could be seen from Krug Road.

Back at the cemetery, Winchester handed the bag of cocaine to Detective Albaugh. Detective Albaugh directed Winchester to keep the remaining ten dollars to buy minutes for his cell phone. After a short debriefing and a search of Winchester and his car, Winchester left.

On September 11, 2006, Hernandez was charged with two counts of Dealing in Cocaine, as Class A felonies. The State amended the second count of dealing in cocaine, based on the alleged drug transaction on March 17th, to a Class B felony. After a jury trial, Hernandez was found guilty of Count I, Dealing in Cocaine, as a Class A felony, and not guilty of Count II. The trial court sentenced Hernandez to twenty-five years at the Indiana Department of Correction but suspended ten years to probation.

Hernandez now appeals.

I. Fatally Inconsistent Verdicts

First, Hernandez contends that the jury's verdicts were fatally inconsistent as the charges involved similar transactions and the same parties. In essence, Hernandez claims that the acquittal on one count of dealing and a conviction on the other are irreconcilable. We review verdicts for consistency and will take corrective action if necessary. May v. State, 810 N.E.2d 741, 743 (Ind. Ct. App. 2004). Although perfectly logical verdicts are not required, action by this Court is warranted when confronted with extremely contradictory and irreconcilable verdicts. Id. Verdicts that may seem inconsistent on some level are not legally inconsistent if they can be explained by the fact-finder's exercise of its power to assign the proper weight to and either accept or reject certain pieces of evidence. Id. Additionally, verdicts are inconsistent

> only where they cannot be explained by weight and credibility assigned to the evidence. Thus, an acquittal on one count will not result in reversal of a conviction on a similar or related count, because the former will generally have at least one element (legal or factual) not required for the latter. In such an instance, the finder of fact will be presumed to have doubted the weight or credibility of the evidence presented in support of this distinguishing element.

Owsley v. State, 769 N.E.2d 181, 183 (Ind. Ct. App. 2002), trans. denied.

In Jackson v. State, our Supreme Court held that where the same victim alleged two separate acts of rape against the same defendant, and the jury convicted on one count and acquitted on the other, the verdicts were not fatally inconsistent. Jackson v. State, 540 N.E.2d 1232, 1234 (Ind. 1989). The Court explained that "there can be no necessary inconsistency, as the two counts referred to separate acts which occurred in different places and at different times; and the jury would be well within its prerogative in fully and

sufficiently crediting only that part of the victim's testimony that related to the first attack." Id.

By the same reasoning, the jury here could choose to credit only that part of Winchester's testimony relating to the first sale. The transactions occurred on different days at different times of day, using different recording equipment, and under varying ability of surveillance by police. We therefore conclude that the verdicts are not fatally inconsistent.

II. Authentication of CDs

Next, Hernandez alleges that the trial court abused its discretion in admitting into evidence certain compact disc recordings, which were duplicates of the original digital recordings because they were not properly authenticated. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. Gauvin v. State, 878 N.E.2d 515, 520 (Ind. Ct. App. 2007), trans. denied. An abuse of discretion occurs when a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

"The foundational requirements for the admission of a tape recording made in a non-custodial setting are: (1) that the recording is authentic and correct; (2) that it does not contain evidence otherwise inadmissible; and (3) that it be of such clarity as to be intelligible and enlightening to the jury." Kidd v. State, 738 N.E.2d 1039, 1042 (Ind. 2000). The first prong essentially requires the recording to meet the authentication requirement of Indiana Evidence Rule 901(a), whether the recording is the original or a duplicate. Authentication under this rule is a condition precedent to the admissibility of the item and "is satisfied by

evidence sufficient to support a finding that the matter in question is what its proponent claims." Ind. Evidence Rule 901(a). Authentication of a recording is sufficient to sustain its admission "when evidence establishes a reasonable probability that an item is what it is claimed to be." Thomas v. State, 734 N.E.2d 572, 575 (Ind. 2000).

The recordings at issue were of telephone calls related to the transaction on March 10, 2006, and the actual transaction as captured by a recording device worn by Winchester. As for the two telephone recordings prior to the transaction, Detective Hackerd testified that Winchester's cell phone was connected to Detective Hackerd's recording device when the calls were placed or received. Immediately after each call, Detective Hackerd listened to the recording. The original recordings of the calls were still on Detective Hackerd's recording device, which he had in his possession the day he testified. Once the recordings were made, Detective Hackerd provided his digital recorder to his assistant for the recordings to be downloaded to her computer and then burned onto CDs. The CDs presented as State's Exhibits 3 and 8 were marked as "Phone #1" and "Phone #2" and were initialed by Detectives Albaugh and Hackerd. Detective Hackerd testified that he reviewed and compared the original recordings and the CDs offered as exhibits. He further testified that the CD recordings of the phone conversations between Winchester and Hernandez were accurate. This testimony is sufficient to establish a reasonable probability that the CDs submitted by the State as exhibits contain the accurate recordings of the telephone conversations between Hernandez and Winchester to set up the purchase of cocaine.

As for the recording of the transaction, Detective Hackerd testified that on May 10,

2006, he gave the recording device worn by Winchester to his assistant, Holly McCoy, so that it too could be downloaded onto her computer. Due to the device's limited storage capacity and use in other investigations, the original recording on the device could not be saved for trial. Once the recordings were on McCoy's computer, she would burn a copy of the recording onto a CD. McCoy testified that she is the only person with access to her computer, which is password protected. Winchester, the person who wore the recording device during the transaction on March 10, 2006, testified that he had listened to the CD recording from the drug transaction on the previous day. He said it was an accurate recording of his conversation with Hernandez during the transaction on May 10, 2006. Furthermore, the CD exhibit is initialed by Detectives Hackerd and Albaugh. Detective Hackerd testified that he reviewed the content of the same exhibit and said that the portion of the recording reflecting the conversation of the detectives and Winchester before they left the parking garage and the later debriefing session was accurate. Again, this evidence establishes a reasonable probability that the CD is "what it is claimed to be." Kidd, 734 N.E.2d at 575. Therefore, the trial court did not abuse its discretion in admitting the CDs.

III. Chain of Custody

Finally, Hernandez contends that the trial court abused its discretion in admitting the CD recordings and the cocaine because the State failed to establish an adequate chain of custody. As to the CD recordings, our Supreme Court has noted that there is no chain of custody requirement for admission of tape recordings. McCollum v. State, 582 N.E.2d 804, 812 (Ind. 1991). Rather, "the foundational requirements stated above are sufficient to ensure

that there was no tampering with the evidence." Id.

Drugs, such as the cocaine in this case, are subject to the chain of custody requirements. While the State must establish the chain of possession, it need only demonstrate a reasonable assurance that the piece of evidence passed to the trial in an undisturbed condition. Id. There is a presumption of regularity in the handling of evidence by officers, and a presumption that officers exercise due care in fulfilling their duties. Espinoza v. State, 859 N.E.2d 375, 382 (Ind. Ct. App. 2006). The State is not required to exclude every possibility of tampering. McCollum, 582 N.E.2d at 812. Furthermore, the State need not establish a perfect chain of custody. Id. Any gaps in the chain of custody go to the weight of the evidence and not to admissibility. Culver v. State, 727 N.E.2d 1062, 1067 (Ind. 2000). To successfully challenge a chain of custody, a defendant must present evidence that does more than raise a mere possibility that there may have been evidence tampering. Espinoza, 859 N.E.2d at 382.

Hernandez claims the chain of custody for Exhibit 5, the cocaine, was inadequate because the State failed to explain the location of the exhibit between March 10 and March 16 of 2006, and the chain of custody at the Lowell laboratory from March 19 to May 22 of 2007. However, Detective Hackerd testified that after he received the cocaine from the transaction on March 10, 2006, he weighed, photographed, packaged it and then secured it in a safe in his office. Detective Hackerd later removed the cocaine from his safe and provided it to Detective Albaugh. On March 16, 2006, the evidence was submitted to the Frankfort Police Department property room. The Property Record and Receipt from the police

department indicates that the cocaine remained in the property room from March 16, 2006, until three days later when it was sent to the Lowell laboratory for testing. Detective Albaugh testified that he removed the packaged cocaine from the property room on March 19, 2006, so that it could be sent for testing. It was received by the laboratory that same day, and the chemist performing the tests received it in a sealed state. After performing the necessary tests, the chemist resealed the bag, marking the seal with her initials, employee number and date. On May 22, 2007, Detective Albaugh retrieved the sealed package from the lab and returned it to the property room where it stayed until trial. Based on this evidence, the trial court did not abuse its discretion by admitting the cocaine into evidence.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.